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SEP 10 2004

No. 04-97

IN THE

Supreme Court of the United States

WILLIAM J. BERENS and PHILLIP H. MARTIN, Trustees,

Petitioners,

v.

CWM and ACM, by PAM, and DHM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION 1

I. This Court Has Jurisdiction 1

II. The Trustees Have Standing To Assert The Questions Presented 4

III. The Questions Presented Are Important 7

IV. This Case Is The Appropriate Vehicle To Bring These Important Questions Before The Court .. 9

CONCLUSION 9

TABLE OF CITED AUTHORITIES

CASES

Page

Braniff Airways v. Nebraska State Board, 347 U.S. 590 (1954) 2, 3

In re Bretzman's Will, 135 N.W. 980 (Minn. 1912) .. 5

In re Campell's Trusts, 258 N.W.2d 856 (Minn. 1977) 7

Chambers v. Mississippi, 410 U.S. 284 (1973) 4

Eddings v. Oklahoma, 455 U.S. 104 (1982) 1

In re Estate of Schroeder, 441 N.W.2d 527 (Minn. App. 1989) 5

First National Bank of Dewitt v. Yancey, 826 S.W.2d 287 (Ark. App. 1991) 5

Grannis v. Ordean, 234 U.S. 385 (1914) 2

Michael H. v. Gerald D., 491 U.S. 110 (1989) .. 1, 4, 7, 8

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 2

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 2, 3

Smith v. Sherman, 58 Mass. (4 Cush.) 408 (1849) ... 5

Toledo Trust Co. v. Farmer, 135 N.E.2d 356 (Ohio 1956) 5, 6

Cited Authorities

Page

In re Trust Created by Agreement Dated Dec. 20, 1961, 765 A.2d 746, *cert. denied*, 534 U.S. 889 (2001) 7, 8

In re Trust Created by Hill on Dec. 31, 1917, 499 N.W.2d 475 (Minn. App. 1993) 5

In re Trust Under Agreement of David H. Keiser, Dated Dec. 23, 1925, 572 A.2d 734 (Pa. Super. 1990) 5-6

STATUTES

Minn. Stat. § 501B.16 4

Minn. Stat. § 501B.21 4

REPLY TO BRIEF IN OPPOSITION

By admission or omission, the Claimants' Brief in Opposition has confirmed the essential facts that make this case worthy of this Court's review: The petitioner Trustees have a traditionally protected legal interest in the property of the Trusts, directly tied to their fiduciary duty to distribute that property only to beneficiaries meeting the irrevocable and unamendable terms of the Trusts.[1] The terms of the Trusts have been construed to require actual, biological descent, and the Claimants have stipulated, for purposes of these proceedings, that they are not in fact of that descent. Nonetheless, the decision of the Minnesota Court of Appeals, which the Minnesota Supreme Court refused to review, prevents the Trustees from distributing that Trust property according to the Trusts' terms by holding the Trustees bound to prior parentage "adjudications" in which the Trustees did not and could not have participated.

Deprivation of property without an opportunity to be heard is a fundamental due process violation, and it is worthy of this Court's attention in this circumstance because it is taking place repeatedly in multiple states, with the likelihood that it will continue and increase, based in substantial part on the misapprehension that this Court has blessed this deprivation in its *Michael H.* decision when in fact it has not.

Nothing said in the Brief in Opposition changes any of the facts above. Those facts call for this Court's review.

I. This Court Has Jurisdiction.

The Court has long recognized that "[o]ur jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982). What matters is whether the basis for the claim of federal right has been brought to the state

1. Claimants do not challenge either the legal interest the Trustees hold or their fiduciary duty concerning the same. Rather, they claim, incorrectly, that the Trustees have no state law standing to protect that interest. That claim is demonstrably inaccurate, as shown *infra*.

court's attention, and "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

As this Court has often noted, "the fundamental requisite of due process of law is the opportunity to be heard," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). "[T]here can be no doubt that at a minimum they [the terms of the Due Process Clause] require that deprivation of . . . property by adjudication be preceded by . . . opportunity for hearing appropriate to the nature of the case." *Id.* at 313. Here, the due process issues raised by the Questions Presented were within the clear intendment of the Trustees' contention, raised and repeated throughout the proceedings below,[2] that the results of "parentage" proceedings could not be used to govern their disposition of trust property legally owned by them where they did not and could not have had an opportunity to be heard in those parentage proceedings. *Cf. Braniff Airways v. Nebraska State Board*, 347 U.S. 590, 599 (1954).[3] That "clear intendment"

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2. *See* Pet. at 6-8 & nn.6, 8-9 (citing and quoting record).

3. In *Braniff Airways*, this Court disposed of a complaint similar to that of Claimants here that a due process issue had not been sufficiently raised below:

> [T]he bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process. However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented.

(Cont'd)

was made explicit to the Minnesota Court of Appeals in the beneficiaries' brief to that court,[4] and was also explicit in the Trustees' Petition for Review to the Minnesota Supreme Court, where they made clear that the Minnesota Court of Appeals' application of the parentage adjudications to the Trustees' property was "a violation of due process," citing cases in which the Minnesota Supreme Court had previously recognized that the right the Trustees claimed was fundamental and federally guaranteed. *See* Pet. at 7-8 & nn.8-9.[5]

Moreover, there is no doubt that Claimants clearly understood below that federally guaranteed due process concerns were at issue throughout the proceedings. They did *not* contend, in either their appeal to the Minnesota Court of Appeals or in their opposition to review by the Minnesota Supreme Court, that due process concerns had not been properly raised.[6] Rather,

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(Cont'd)

See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, and cases cited.

347 U.S. at 599 (footnote omitted).

4. *See* Pet. at 6 n.6 (citing, inter alia, the Brief of Respondent Beneficiaries AMP, DDM, JM, DCM, KMR, and SMK to the Minnesota Court of Appeals). Beneficiaries AMP, DDM, JM, DCM, KMR, and SMK are petitioners in this Court in No. 04-152, currently pending along with this Petition.

5. As pointed out in the Petition to this Court in No. 04-152, Beneficiaries AMP, DDM, JM, DCM, KMR, and SMK also explicitly pressed a due process claim in their petition for review to the Minnesota Supreme Court. *See* Pet. in No. 04-152 at 6 n.10.

6. Claimants also did not complain below that the Trustees had not notified the state attorney general of a constitutional challenge to the Minnesota Parentage Act. Presumably that is because Claimants recognized that the due process challenge here is not to the Act, but to the subsequent use of a prior "adjudication" under the Act to cut off

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they responded to those concerns by arguing (inaccurately) on the merits that this Court's decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), had already established that there was no due process violation. *See* Pet. at 8, 17.

Finally, it is clear that this Court's jurisdiction is not defeated simply because a state court refused to consider or failed to articulate its denial of a claim based on a federal right. *See, e.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973). Federal due process claims were pressed below, and this Court has jurisdiction to entertain the Questions Presented.

II. The Trustees Have Standing To Assert The Questions Presented.

The due process questions are squarely presented by this case, and Claimants' supposed state law issues are, in fact, not issues at all.[7]

Claimants are not correct in asserting that the Trustees have no standing to appeal from the court of appeals judgment and are not aggrieved parties under Minnesota law. Minnesota Statutes Section 501B.21 (2002) provides: "An appeal from the order [pursuant to a Section 501B.16 petition] may be taken by *any* party . . . ." (emphasis added), and arguments such as those made by Claimants have been rejected by the Minnesota courts:

> Respondents . . . contend that [an entity nominated as a trustee and personal representative] cannot

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third-party property rights when there was no opportunity in that prior "adjudication" for those third parties to be heard, which is what the Minnesota Court of Appeals did here.

7. As with their arguments in the preceding section, none of these supposedly state-law based arguments regarding standing were made by Claimants to the state courts below.

> appeal because it is not an aggrieved party since it does not have a beneficial interest in the estate. This argument is . . . meritless. A financial stake in the litigation is not necessary in order to be an aggrieved party . . . . To hold otherwise would mean that . . . trustees do not have standing to challenge orders which are in derogation of their fiduciary responsibilities.

In re Estate of Schroeder, 441 N.W.2d 527, 530 (Minn. App. 1989). *See also In re Bretzman's Will*, 135 N.W. 980, 982 (Minn. 1912) ("'A party is held aggrieved whose rights are necessarily affected by the decree. And this is equally true, whether the rights to be affected are those which the party has in a personal or representative capacity.'") (quoting *Smith v. Sherman*, 58 Mass. (4 Cush.) 408, 411 (1849)). Furthermore, *In re Trust Created by Hill on Dec. 31, 1917*, 499 N.W.2d 475 (Minn. App. 1993), the Minnesota case cited by Claimants in their Brief in Opposition on these points (Br. in Opp. at 11), did not hold that a trustee may not be an aggrieved party. Rather, that case held that an entity that was not a trustee or even a valid successor trustee did not have standing to appeal the judgment. *See* 499 N.W.2d at 487.

Toledo Trust Co. v. Farmer, 135 N.E.2d 356 (Ohio 1956), which Claimants also cite, is indeed telling, but not for the argument Claimants urge. While the court in that case did hold that a trustee generally is not an aggrieved party if the trustee has no duty to perform other than paying out funds to beneficiaries pursuant to a court order,[8] it went on to note that

8. The holdings of the cases from other jurisdictions cited by the Claimants are similar. *See First Nat'l Bank of Dewitt v. Yancey*, 826 S.W.2d 287, 288-89 (Ark. App. 1991) (reciting general rule in holding that trustee was not an aggrieved party and could not appeal lower court order determining amount of income to which beneficiary was entitled); *In re Trust Under Agreement of David H. Keiser, Dated Dec. 23, 1925*, (Cont'd)

"a different rule governs where a judgment prevents the trustee from discharging his duties under the trust." 135 N.E.2d at 361.

> Where the order or judgment . . . prevents the trustee from discharging his duties under the trust, or threatens to defeat the purpose of the trust, or depletes the trust fund by allowance of unreasonable or unfounded claims against it, the trustee, though having no personal interest in the litigation, is not a disinterested party. In such case, he, in his fiduciary or representative capacity, is aggrieved by the judgment or order, and may appeal therefrom, whether the litigation is between the beneficiaries themselves or between the trust and third parties.

Id. (quotation and citations omitted). Here, the Trustees brought their initial petition to determine the proper discharge of their duty as trustees to uphold the settlors' intent regarding the identification of trust beneficiaries. *See* Pet. at 4-5 & n.5; *id.* at 11-12. The court of appeals' decision prevents the Trustees from discharging that duty, on the basis of prior "adjudications" in which the Trustees did not and could not participate.[9]

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572 A.2d 734, 735-37 (Pa. Super. 1990) (trustee was not an aggrieved party and could not reopen adjudication of amounts distributed when distributions had been made pursuant to an order of the court).

9. Claimants acknowledge that the court of appeals did not base its decision on the merits of the district court's construction of the Trusts' language, thus leaving the construction in that sense "undisturbed" and instead deciding the case solely on the basis of the preclusive effect of the prior "adjudications" under Florida and Minnesota law, in which all parties admit the Trustees had no right to participate. What that means is that this Court is not being asked to review any Minnesota state law trust construction issue; the due process issues raised are both squarely presented and the only questions on which this Court is being asked to pass.

Claimants' arguments regarding the constitutionally protected interest of the Trustees are similarly flawed. Claimants apparently argue that even though the Trustees hold legal title to the property, they do not have any due process rights with respect to that property because the beneficial interest is held by the beneficiaries of the Trusts, who may assert causes of action regarding the same. *See* Br. in Opp. at 11-12. This argument is misleading; the Trustees did not bring an action to enforce a particular beneficiary's beneficial interest. Their action was not one to determine rights as between beneficiaries or classes of beneficiaries, but rather to determine the *identity* of beneficiaries, consistent with the settlors' intent. As between the property of the trust and those who may be nonbeneficiaries, a trustee is not merely a disinterested stakeholder: a trustee cannot administer a trust for the benefit of persons not intended to be beneficiaries thereof, as Minnesota has long held. *See, e.g.*, *In re Campell's Trusts*, 258 N.W.2d 856, 860-863 (Minn. 1977). The Claimants' argument that the Trustees do not have a recognized, protected interest in the Trusts' property thus merely begs the merits of the Trustees' action.

III. The Questions Presented Are Important.

That neither the Minnesota Court of Appeals nor the Minnesota Supreme Court openly discussed the fundamental due process principles violated by the decision below does not detract from the reasons to grant review here; rather, it highlights them. It shows that the misapplication of this Court's decision in *Michael H.*, and this Court's denial of certiorari in *In re Trust Created by Agreement Dated Dec. 20, 1961* ("*In re Johnson Trust*"), 765 A.2d 746 (N.J.), *cert. denied*, 534 U.S. 889 (2001), are leading lower courts to consider the due process issues as matters already decided and unworthy of further consideration, as Claimants urged below. *Cf.* Pet. at 17 (quoting Claimants' brief in opposition to review by the Minnesota Supreme Court). That is clearly not correct, as demonstrated in the Petition

(Pet. at 17-20),[10] but it is perceived as such by lower courts, as this case (and the *In re Johnson Trust* case from New Jersey) proves.

That misperception is important, and has nationwide consequences on long-settled expectations.[11] Trust property once irrevocably and unamendably given to trustees cannot be taken back, nor can the terms of its disposition be changed. Due process most fundamentally means that property dispositions may not be adjudicated without the owner having an opportunity to be heard. But the result of the misperception of *Michael H.* is that the policy-based determinations of "parentage" proceedings — where there is no right for trustees of trust property to be heard about that property — are being used to thwart the expectations of trust settlors who have already left property for disposition to their actual blood relations. And because it is a plurality decision of this Court that is being misperceived as sanctioning such decisions despite due process principles, only this Court can correct the problem.

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10. Claimants simply fail to acknowledge that *Michael H.* did not purport to deal with protected property interests of third parties, and that five Justices concluded there would be a procedural due process problem with a conclusive presumption that purported to terminate a constitutionally protected interest without any hearing whatsoever. *See* Pet. at 19-20, quoting 491 U.S. at 136 (Brennan, J., dissenting) (citing opinions of other Justices). It was only because Justice Stevens concluded that the petitioner in that case had been afforded an opportunity to be heard that he concurred in the plurality decision. *See id.* at 132-136 (Stevens, J., concurring in the judgment); *see also* Pet. at 18 n.15.

11. As the Petition notes, nineteen states have versions of Uniform Parentage Acts, and all states provide for the enforcement of divorce decree child support obligations. *See* Pet. at 21 & n.16. While Claimants cite a litany of cases in footnote 13 of their Brief in Opposition, only one — the *In re Johnson Trust* decision noted above — deals with due process concerns.

IV. This Case Is The Appropriate Vehicle To Bring These Important Questions Before The Court.

This case allows the Court to explore the due process concerns at issue with all the relevant parties — trustees, acknowledged trust beneficiaries, and claimants asserting beneficiary status as a result of "parentage adjudications" — present and separately represented. It assures the Court that the important questions and fundamental principles at stake will be well-aired before it, by parties with very substantial stakes in the outcome.[12]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 10, 2004

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12. As noted in the Petition, the Trusts at issue have a collective value of over $900 million. Pet. at 4 n.4.